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Proposed Rule to Exempt Organic Producers and Marketers from Assessment for Market Promotion Activities under Marketing Order Programs

Submitted by Horizon Organic Dairy
6311 Horizon Lane
Longmont, CO 80503
(303) 530-2711
For questions or clarification, contact:

Steve Jacobson Vice President-Operations stevej@horizonorganic.com (303) 530-2711 ext. 191	Kelly Shea Director-Organic Agriculture kellys@horizonorganic.com (719) 488-3803	Jule Taylor Director-Milk Procurement juleet@horizonorganic.com (303) 530-2711 ext. 305
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Horizon Organic Dairy would like to thank the people at the United States Department of Agriculture's Agricultural Marketing Service for the effort they have put forth in the creation of this proposed rule, which was intended by Congress in Section 10607 of the 2002 Farm Bill¹ to exempt the organic industry from participation in marketing and promotion orders through an amendment to Section 501 of the Federal Agriculture Improvement and Reform Act (FAIR) of 1996.²

The actual language in the 2002 Farm Bill reads as follows:

SEC. 10607. EXEMPTION OF CERTIFIED ORGANIC PRODUCTS FROM ASSESSMENTS.

(a) IN GENERAL- Section 501 of the Federal Agriculture Improvement and Reform Act of 1996 (7 U.S.C. 7401) is amended by adding at the end

The following:

e) EXEMPTION OF CERTIFIED ORGANIC PRODUCTS FROM ASSESSMENTS

(1) IN GENERAL- Notwithstanding any provision of a commodity promotion law, a person that produces and markets solely 100 percent organic products, and that does not produce any conventional or nonorganic products, shall be exempt from the payment of an assessment under a commodity promotion law with respect to any agricultural commodity that is produced on a certified organic farm (as defined in section 2103 of the Organic Foods Production Act of 1990 (7 U.S.C. 6502).

¹ Pub. L. 107-171 codified at in several places in the U.S. Code, and known as the Farm Security and Rural Investment Act, hereinafter referred to as "the 2002 Farm Bill."

² Pub. L. 104-127 codified at several places in the U.S. Code, and known as the Federal Agriculture Improvement and Reform Act of 1996 hereinafter referred to as the "FAIR Act."

2) REGULATIONS- Not later than 1 year after the date of enactment of this subsection, the Secretary shall promulgate regulations concerning eligibility and compliance for an exemption under paragraph (1).

Horizon Organic Dairy is the world's leading organic dairy company and Horizon Organic™ is the leading organic retail brand in any food category in the United States. Our company's purchases support hundreds of thousands of acres of organic agriculture, representing the world's largest commitment to the stewardship of organic agriculture. Our products can be found in over 64% of all grocery stores in the United States, and nearly all natural foods stores.

Horizon Organic Dairy owns organic dairy farms in Maryland and Idaho. Our contract producers are located in the states of Colorado, Pennsylvania, New York, Maine, Vermont, Michigan, Wisconsin, Minnesota, California, and Oregon. We also market the Organic Cow of Vermont™ label.

Horizon Organic is one of the few companies that focuses exclusively on certified organic food products. The issue of "organic integrity" has always been our number-one calling. We have always, and will always, remain true to the organic mission. The shared vision of Horizon Organic Dairy team members is to see millions of acres of land converted to organic, sustainable farming methods. Through our contracts with independent producers for the purchase of milk, heifers, and feed ingredients we are seeing our dream fulfilled. Increased organic production should boost the economy in small towns, bring the next generation back to the farm, and lower the American farmer's dependence on agriculture subsidies.

As members of the Organic Trade Association (OTA), we generally support their comments on this proposed rule. In particular, the OTA very truthfully notes that "The proposed rule as presented is overly burdensome...It is USDA's responsibility to see that no...organic producer [handler, processor] is assessed...This can be done more simply than the process outlined in the proposed rule."

Horizon Organic does have some particular concerns. We therefore wish to stress the importance of the following issues, so that the Secretary can address them in the final rule on this subject. We anticipate submission of more detailed comments, concerning dairy, when the second proposed rule to fully implement Section 10607 is published.

- **The definitions appearing in the FAIR Act and the Organic Foods Production Act³ must be used to implement Section 10607 of the 2002 Farm Bill to facilitate Congressional intent.**

Horizon Organic respectfully suggests the Secretary utilize the following definitions from the controlling statutes and rules.

Producer: Any person who is engaged in the production and sale of an agricultural commodity in the U.S. or who owns, or shares the ownership and risk of loss of the agricultural commodity.⁴

2. **First handler:** [T]he first person who buys or takes possession of an agricultural commodity, from a producer for marketing. If a producer markets the agricultural commodity directly to consumers, the producer shall be considered to be the first handler with respect to the agricultural commodity produced by the producer.⁵

³ Pub. L. 101-624, codified at 7 U.S.C. §6501 *et seq.*, and known as the Organic Foods Production Act, hereinafter, referred to as "OFPA."

⁴ 7 U.S.C. §7412(11)

⁵ 7 U.S.C. §7412(5)

3. **Market:** To sell or to otherwise dispose of an agricultural commodity in interstate, foreign, or intrastate commerce.⁶

Because the 10607 exemption also refers to “organic products” and “certified organic farm” Congress inescapably intended that these terms have the meaning it set forth in OFPA. The following definitions are taken from the controlling statutes and should replace the proposed definition of “produce” that is inconsistent with the FAIR Act and OFPA.

4. **Certified Organic Farm:** A farm, or portion of a farm, or site where agricultural products or livestock are produced, that is certified by the certifying agent under this chapter as utilizing a system of organic farming as described by this chapter.⁷
5. **Certified Organic Handling Operation:** Any operation, or portion of any handling operation, that is certified by the certifying agent under this chapter as utilizing a system of organic handling as described under this chapter.⁸
6. **Organically Produced:** An agricultural product that is produced and handled in accordance with this chapter.⁹
7. **Split Operation:** An operation that produces or handles both organic and nonorganic agricultural products.¹⁰

Most importantly, the proposed definition of “produce” artificially imposes a requirement that one “alter” the product. It is unclear what purpose this serves in implementing a complete exemption. The word “alter” does not appear in the 10607 exemption statute or OFPA and should not appear in the final rule.

The 10607 exemption statute is a total exemption from all assessments rather than a partial exemption as in this proposed rule. The proposed partial exemption fails to implement Congress’ clear intent to exempt from assessment an “agricultural commodity that is produced on a certified organic farm” as defined by OFPA.

The 10607 exemption statute unambiguously amended 7 U.S.C. §7401 of the subchapter entitled Commodity promotion and evaluation to exempt “certified organic products from assessment.” See 7 U.S.C. §7401(e) (Exemption of certified products from assessments). Under the FAIR Act, assessments pay for “promotion, research, industry information, or consumer information activities.” See 7 U.S.C. §7401(a) (definition of commodity promotion law). Despite the fact that Congress intended to exempt certified organic producers from all of these expenditures, the proposed rule exempts only “assessments for market promotion, including paid advertising.”

“Commodity promotion law” is the precise term used by Congress in the 10607 exemption statute and is exactly that from which organic producers are to be exempted. According to Black’s Law Dictionary, “exempt” means, “To relieve, excuse, or set free from a duty or service imposed upon

⁶ 7 U.S.C. §7412(8)

⁷ 7 U.S.C. §6502(4)

⁸ 7 U.S.C. §6502(5)

⁹ 7 U.S.C. §6502(14)

¹⁰ 7 C.F.R. Part 205.1 (implementing the definition of “certified organic farm” and “certified organic handling operation”)

the general class to which the individual exempted belongs¹¹.” The intent of Congress is really quite clear, and we therefore respectfully insist that subsequent versions of this proposed rule reflect the intent of 10607.

- **The proposed rule speaks about 100 percent organic as defined in section 2103 of the Organic Foods Production Act of 1990 (7 USC 6502). That section of OFPA is the section of definitions. There is no definition of 100 percent organic in OFPA. When Congress quoted OFPA, they were indicating the definitions involved in producing and marketing certified organic. A certified organic producer that produces and markets organically the particular products governed by these commodity promotion programs is eligible for the exemption, as is the certified organic processor and the certified organic handler.**

The first clause of the 10607 exemption statute mandates a person shall be exempt from assessment if that person “produces and markets solely 100 percent organic products.” 7 U.S.C. §7401(e) (1) Because there is no definition in OFPA of 100 percent organic products, if that producer’s farm is certified under OFPA, according to the guidelines of the National Organic Program, any products that are certified organic by a USDA accredited organic certification agency are intended to qualify for the exemption.

As noted earlier in this document, there are definitions in 6502 for:

6502 (4) Certified Organic Farm. The term "certified organic farm" means a farm, or portion of a farm, or site where agricultural products or livestock are produced, that is certified by the certifying agent under this chapter as utilizing a system of organic farming as described by this chapter.

6502 (5) Certified Organic Handling Operation. The term "certified organic handling operation" means any operation, or portion of any handling operation, that is certified by the certifying agent under this chapter as utilizing a system of organic handling as described under this chapter.

6502 (8) Handle: The term "handle" means to sell, process or package agricultural products.

6502 (9) Handler: The term "handler" means any person engaged in the business of handling agricultural products, except such term shall not include final retailers of agricultural products that do not process agricultural products.

6502 (10) Handling Operation: The term "handling operation" means any operation or portion of an operation (except final retailers of agricultural products that do not process agricultural products) that (A) receives or otherwise acquires agricultural products; and (B) processes, packages or stores such products.

(14) Organically Produced: The term "organically produced" means an agricultural product that is produced and handled in accordance with this chapter.

(15) Person: The term "person" means an individual, group of individuals, corporation, association, organization, cooperative, or other entity.

(17) Processing: The term "processing" means cooking, baking, heating, drying, mixing, grinding, churning, separating, extracting, cutting, fermenting, eviscerating, preserving, dehydrating, freezing, or otherwise manufacturing, and includes the packaging, canning, jarring, or otherwise enclosing food in a container.

¹¹ Blacks Law Dictionary at p. 571 (6th Ed.)

(18) **Producer:** The term "producer" means a person who engages in the business of growing or producing food or feed.

The proposed Rule uses the following examples¹²:

1. "A grower who produces and markets (handles) 100 percent certified organic, is certified as an organic handling operation, and pays the marketing order assessments, is eligible for an exemption for the portion of the assessments used for marketing promotion."
2. "A handler receives 100 percent of the commodity as certified organic and is certified as an organic handling operation. The handler alters (e.g., shells, slices, processes, or in some other way alters) the commodity and pays marketing order assessments. The handler is eligible for an exemption for the portion of the assessments used for marketing promotion."
3. "A grower who produces and markets (handles) both certified organic and conventional commodities is not eligible for the exemption because that person is not producing and marketing solely 100 percent certified organic commodities."
4. "A handler receives 100 percent of a commodity that is organic, and the handler is certified as an organic handling operation. The handler sorts, packages, markets, and pays assessments on the commodity. The handler is not eligible for the exemption because the handler did not alter (e.g., shell, slice, process, or in some other way alter) the commodity."

We would like to point out the areas in each example that are contrary to Congressional intent.

Example #1:

The producer who is certified organic should not pay any assessments. Congressional intent was obviously to "exempt from the payment of an assessment under a commodity promotion law with respect to any agricultural commodity that is produced on a certified organic farm¹³." Furthermore, not all certified organic growers are or need to be certified organic as handlers.

Suggested rewrite:

A certified organic farm is eligible for exemption on the certified organic portion of their output.

Example #2:

Because the term "certified organic handling operation" means any operation, or portion of any handling operation, that is certified by the certifying agent under this chapter as utilizing a system of organic handling as described under OFPA, the Rule should not limit only those who receive 100 percent of a commodity as certified organic. The handler who is certified organic should not pay any assessments on their organic output. Congressional intent was obviously to "exempt from the payment of an assessment under a commodity promotion law with respect to any agricultural commodity that is produced on a certified organic farm¹⁴."

Suggested rewrite:

A certified organic handler or processor is eligible for full exemption on the certified organic portion of their output.

Example #3:

Because occasionally organic farmers need to divert crops or livestock to the conventional market to fulfill organic standards, the organic producer should be exempted on the portion of their output that is certified organic. Furthermore, OFPA defines a certified organic farm as "a farm, a portion of a farm, or a site." If

¹² Federal Register/Vol. 68, No. 231, P. 67382

¹³ Section 10607 of the 2002 Farm Bill

¹⁴ Section 10607 of the 2002 Farm Bill

OFPA allows portions of farms to be certified organic, exemptions should follow on the portions of output that are certified organic.

Suggested rewrite:

A certified organic farm is eligible for full exemption on the certified organic portion of their output.

Example #4:

Once again, in the proposed rule, the proposed definition of “produce” artificially imposes a requirement that one “alter” the product. As noted earlier, it is unclear what purpose this serves in implementing a complete exemption. The word “alter” does not appear in the 10607 exemption statute, or OFPA, and should not appear as a requirement in the final rule.

Suggested rewrite:

A certified organic handler or processor is eligible for full exemption on the certified organic portion of their output.

A producer, processor, or handler is permitted to engage in commerce of organic and nonorganic agricultural commodities. It is the nature and legal status of the agricultural commodity (i.e. certified organic or not) that determines eligibility for exemption under Congress’ approach.

If a farmer produces non-organic products that are not subject to the commodity promotion law that his organic products are, he is still eligible for the exemption on the organic program crop. Additionally, as noted in Example #3 above, if that farmer must divert an animal or a crop product to the conventional market in order to comply with the organic rules, that would not constitute a disqualifying sale because such a construction would penalize the farmer for compliance with the National Organic Program’s rules. *See e.g. 7 C.F.R. 205.238(c) (7) (barring organic livestock producer from withholding healthcare to maintain organic status of animal; mandating diversion to conventional market).* Clearly Congress did not intend for a farmer to lose the entitlement to an exemption *when in full compliance with the USDA’s National Organic Program.*

Finally, it should be obvious that Congress did not intend to bar eligibility for the exemption if a certified organic product is transacted in the conventional marketplace. In that situation the product remains an organic. The fact that the certified organic product does not transact in the organic marketplace is irrelevant.

- **USDA NOP accredited certification agents, and not a commodity marketing board, should be responsible for determining the organic status of products seeking to receive an exemption. Furthermore, first handlers, under the FAIR Act, and not a commodity marketing board, should be responsible for determining the eligibility of certified organic products to receive an exemption.**

Under the proposed rule, [T]he person would submit an application for exemption to the applicable committee or board. The application would be reviewed by the committee or board to determine whether the applicant is eligible for an assessment exemption. If the application is disapproved, the marketing order committee or board will notify the handler of the reasons for disapproval. *See Proposed Rule* at 67382. This proposal is awkward and unworkable. First it unnecessarily duplicates the paperwork certified organic producers and handlers submit to their accredited certification agency to demonstrate that certified organic products produced and handled maintain their organic integrity. Under the proposed approach, both entities must submit paperwork to the marketing board or committee.

It is far simpler to have the handler, who will be operating under the organic standards, require documentation of organic certification, and verification that the entire particular commodity was organic. The standard audit process for the payment of fees can be applied to determine that the

handler has properly assessed or exempted its producers. Under the OFPA, 7 U.S.C. §6519 and the implementing regulations, any person making a false statement may be liable. Thus, the producer would be held accountable for any false information regarding the collection or payment of any fees, as well as any false claim that led to erroneous repayment.

Even assuming the proposed partial exemption is consistent with the 10607 exemption statute, which it is not, the proposed method of calculation of the rate of exemption from assessment, and its implementation is too complicated, burdensome and imposes administrative costs that are too high. The approach should be simplified.

The proposed rule requires the eligibility of a person for the partial exemption determined by each marketing board for each commodity for which relief is sought. After paying an assessment based on an *estimated* rate of assessment, an *actual* assessment will be calculated and the organic entity will then receive an additional assessment, a reimbursement or a credit. This approach creates significant paperwork for organic entities and frustrates the intent of Congress when it created and passed the 10607 exemption statute in the 2002 Farm Bill. In all cases, exemption will require eligibility filings, record keeping, some accounting and tax treatment and a need to keep track of the estimated versus actual expenditures of the marketing board as well as review of the board's calculation of the assessment rate.

In short, this a burdensome approach to a statutory provision that proposed to exempt organic entities from a regulatory burden. The proposed rule has turned a narrow authorization to adopt regulations implementing the exemption into a basis for imposing a new assessment. This approach is contrary to Congressional intent, as well as enmeshes every marketing board affected by the proposed rule, and every eligible person, in an arbitrary and unworkable assessment and collection scheme.